

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. 2:05-CV-131

Hon. Richard Alan Enslen

v.

WILLIAM MONTGOMERY,
MONTGOMERY AGGREGATE
PRODUCTS, INC., and CCMS
ASSOCIATES, INC.,

CONSENT DECREE

Defendants.

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WHEREAS, on or about September 17, 2003, the United States Environmental Protection Agency, Region 5 (U.S. EPA), and Respondents, CCMS Associates, Inc. (CCMS), and William E. Montgomery (Montgomery), as an individual, entered into an administrative Consent Agreement and Final Order (CAFO), which attempted to resolve all matters then outstanding between the Parties named in this Paragraph in two consolidated administrative enforcement actions filed pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g).

WHEREAS, the CAFO attempted to resolve U.S. EPA's allegations that CAFO Respondents had violated Section 301 and either Section 402 or Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1311 and § 1342 or § 1344, by discharging pollutants into wetlands in Sault Ste. Marie, Michigan without first obtaining a CWA Section 402 or Section 404 permit, and further alleged that Respondents had violated Section 309(a) of the CWA by failing to comply with administrative compliance orders issued to Respondents by U.S. EPA under the authority of Section 309(a) of the CWA, 33 U.S.C. § 1319(a), on or about December 6, 2001, and

WHEREAS, the CAFO provided that CAFO Respondents CCMS Associates, Inc. and William E. Montgomery would pay a civil administrative penalty of \$30,000 in settlement of these alleged violations of the CWA provisions, and

WHEREAS, the CAFO additionally provided that not later than one year (365 days) after the effective date of the CAFO, unless CAFO Respondents were granted an extension by the Michigan Department of Environmental Quality (MDEQ), Respondents CCMS

Associates, Inc. and William E. Montgomery would construct 18.51 acres of mitigation wetlands in accordance with the permit issued to Respondent CCMS by the MDEQ, which was attached to the complaint filed in one of the consolidated administrative actions that resulted in the CAFO, and

WHEREAS the effective date of the CAFO was September 17, 2003, and Respondents have not paid the \$30,000 administrative penalty, or constructed the required 18.51 acres of wetlands mitigation and have not been granted an extension by MDEQ, and

WHEREAS, U.S. EPA alleges that CAFO Respondents are in violation of their responsibilities under the CAFO at the time of the filing of this judicial Consent Decree herein, and

WHEREAS, William E. Montgomery is also the president and sole shareholder of Montgomery Aggregate Products, Inc., and

WHEREAS, on September 23, 2003, U.S. EPA Region 5 filed an administrative complaint against William E. Montgomery and Montgomery Aggregate Products, Inc., under Section 113(d) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d), alleging violations of the New Source Performance Standards and the Michigan State Implementation Plan (SIP), and

WHEREAS, on February 17, 2004, U.S. EPA filed a motion for voluntary dismissal, without prejudice, of the administrative complaint, to enable it to engage in settlement discussions with William E. Montgomery and Montgomery Aggregate Products, Inc. and whereas this motion was granted on February 23, 2004, and

WHEREAS, the United States, in its judicially-filed Complaint sought enforcement of the CAFO entered under the CWA, and repeated the allegations in the administrative complaint filed previously under the CAA by U.S. EPA, and

WHEREAS, General Permit No. 83-02 issued to Montgomery Aggregate Products was revoked by the Michigan Department of Environmental Quality on December 20, 2006, and

WHEREAS the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest,

NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section I, below, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355; CAA Section 113(b), 42 U.S.C. § 7413(b); and CWA Sections 309(b), 33 U.S.C. §§ 1319(b), and 309(g)(9), 33 U.S.C. §1319(g)(9); and over the Parties. Venue lies in this District pursuant to 28 U.S.C. §§ 1391(b)-(c) and 1395(a); CAA Section 113(b), 42 U.S.C. § 7413(b); and CWA Sections 309(b), 33 U.S.C. §§ 1319(b) and 309(g)(9), 33 U.S.C. §1319(g)(9); because Settling Defendants do business in this District, the alleged violations occurred in this District, and because this is an action for a fine or penalty and Settling Defendants are found in this District. For the sole purpose of this Decree, Settling

Defendants do not contest the Court's jurisdiction over this action or over Settling Defendants and do not contest venue in this judicial district.

2. For the sole purpose of this Consent Decree, Settling Defendants agree that the Complaint states claims upon which relief may be granted pursuant to CAA Section 113(b), 42 U.S.C. § 7413(b), and CWA Sections 309(b), 33 U.S.C. §§ 1319(b) and 309(g)(9), 33 U.S.C. §1319(g)(9).

3. Notice of the commencement of this action has been given to the State of Michigan, as required by CAA Section 113(b), 42 U.S.C. § 7413(b); and CWA Section 309(b), 33 U.S.C. § 1319(b).

II. APPLICABILITY

4. The obligations of this Consent Decree apply to and are binding upon the United States; and upon Settling Defendants, their agents, successors, and assigns. All of the obligations set forth in this Consent Decree are incumbent upon William E. Montgomery, as an individual. Where an obligation is made incumbent upon "Settling Defendants," that obligation is incumbent upon William E. Montgomery, and Montgomery Aggregate Products, Inc., and their agents, successors, and assigns. Certain other obligations are made solely incumbent upon Settling Defendant William E. Montgomery and his agents, successors, and assigns; these obligations are not the responsibility of Montgomery Aggregate Products, Inc., unless it is or becomes an agent, successor or assign of William E. Montgomery.

5. Where Settling Defendants William E. Montgomery or another party seeks, voluntarily or involuntarily, to transfer the ownership interest or operation of the 80 acre parent parcel, the north 24.25 acres of which has been set aside for the 18.51 acres of mitigation

wetlands and 5.74 acre buffer area, as defined in the MDEQ permit and Paragraph 13 of this Consent Decree, at least 30 days prior to the proposed transfer, Settling Defendants shall provide a copy of this Consent Decree to each prospective successor owner or operator and shall simultaneously verify such by a written notice to U.S. EPA Region 5, the United States Attorney for the Western District of Michigan, and the United States Department of Justice, in accordance with Section XIV of this Decree (Notices). Any voluntary transfer of ownership interest or operation must be conditioned upon the transferee's written agreement to undertake the wetlands mitigation obligations required by Paragraph 12 of this Decree. No such transfer of ownership shall relieve Settling Defendants of their obligation to ensure that the terms of the Decree are implemented.

6. Settling Defendants shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work required under this Consent Decree; Settling Defendants shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

7. In any action to enforce this Consent Decree, Settling Defendants shall not raise as a defense the failure by any of their respective officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

III. DEFINITIONS

8. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in the Acts or in regulations promulgated pursuant to the Acts, shall have the

meaning assigned to them in the Acts and such regulations. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

- a. “Acts” shall mean the CAA and the CWA;
- b. “CAA” shall mean the Clean Air Act, as amended, 42 U.S.C. §§ 7401 et seq., and any regulations promulgated thereunder;
- c. “Complaint” shall mean the complaint filed by the United States in this action;
- d. “Consent Decree” or “Decree” shall mean this Decree and all attachments hereto (listed in Section XXI);
- e. “CWA” shall mean the Federal Water Pollution Control Act, commonly known as the Clean Water Act, 33 U.S.C. §§ 1251, et seq., and any regulations promulgated thereunder;
- f. “Day” shall mean a calendar day unless expressly stated to be a working day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day;
- g. “Effective Date” shall mean the date of entry of this Consent Decree by the Court after satisfaction of the public notice and comment procedures set forth in Section XIX of this Consent Decree (Public Participation);
- h. “MDEQ” shall mean the Michigan Department of Environmental Quality;
- I. “NSPS” shall mean the “New Source Performance Standards.” General standards which are applicable to all affected facilities are set forth at 40 C.F.R.

Subpart A, §§ 60.1 through 60.19. Additional provisions specific to nonmetallic mineral processing plants are set forth in Subpart OOO, §§ 60.670 through 60.679;

- j. “Paragraph” shall mean a portion of this Decree identified by an arabic numeral;
- k. “Parties” shall mean the United States and Settling Defendants;
- l. “Section” shall mean a portion of this Decree identified by a roman numeral;
- m. “Settling Defendants” shall mean William E. Montgomery, and Montgomery Aggregate Products, Inc.;
- n. “State” shall mean the State of Michigan;
- o. “United States” shall mean the United States of America, acting on behalf of U.S. EPA; and
- p. “U.S. EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

IV. CIVIL PENALTY

9. In settlement of the allegations set forth herein under the CWA and the CAA, Settling Defendants shall pay a civil penalty in the amount of \$68,218 to the United States of America, together with interest at the rate of 2 percent from the date of February 1, 2007, pursuant to the schedule below:

Payment	Date due	Principal	Interest	Total
1	1/31/2008	\$5,881	\$119	\$6,000
2	7/31/2008	\$5,823	\$177	\$6,000
3	1/31/2009	\$11,530	\$470	\$12,000
4	7/31/2009	\$11,415	\$585	\$12,000

Payment	Date due	Principal	Interest	Total
5	1/31/2010	\$11,302	\$698	\$12,000
6	7/31/2010	\$11,189	\$811	\$12,000
7	1/31/2011	\$11,078	\$922	\$12,000
Total Civil Penalty		\$68,218	\$3,782	\$72,000

Settling Defendants William E. Montgomery and Montgomery Aggregate Products are jointly and severally liable for each payment set forth in this Paragraph. Payments to be made under this Paragraph shall be made pursuant to the instructions set forth in Paragraph 10. Settling Defendants may at any time prepay the principal amount without any penalty. In the event of such prepayment, interest on the payment at the rate of 2 percent will be calculated and paid to the date that payment is made, and thereafter will cease to accrue. Except as expressly set forth herein, all payments made pursuant to the schedule set forth above shall be made in compliance with, and are subject to, all provisions of the Consent Decree.

10. Payments to be made pursuant to Paragraphs 9 of this Consent Decree shall be paid to the United States by Electronic Funds Transfer ("EFT") to the United States Department of Justice, in accordance with current EFT procedures, referencing the USAO File Number 2004V00131 and Civil Action No. 2:05-CV-131 (RAE). The costs of such EFT shall be Settling Defendants' responsibility. Payments shall be made in accordance with instructions provided to Settling Defendants by the Financial Litigation Unit of the U.S. Attorney's Office in the Western District of Michigan. Any funds received after 11:00 a.m. (EST) shall be credited on the next business day. Settling Defendants shall provide notice of payment, referencing the USAO File

Number 2004V00131 and Civil Action No. 2:05-CV-131 (RAE), to the Department of Justice and to U.S. EPA, as provided in Section XIV (Notices).

V. COMPLIANCE REQUIREMENTS

11. Environmental Compliance. Settling Defendants shall comply with Section 111 of the Clean Air Act, 42 U.S.C. § 7411; 40 C.F.R. §§ 60.670 through 60.680 and Michigan Air Pollution Control Commission Rule R336.1201 (Rule 201) and the Michigan State Implementation Plan (SIP); and Sections 309(g), Section 402 and Section 404 of the Clean Water Act, 33 U.S.C. §§ 1311(a), 1342 and 1344; and MCL ch. 324 §§ 30301 et seq., and Mich. Admin. Code R. 281.921-925.

12. Wetlands Mitigation. Settling Defendant William Montgomery agrees to construct 18.51 acres of mitigation wetlands in accordance with the permit issued to Respondent CCMS by the Michigan Department of Environmental Quality, which is attached as Attachment A to this Consent Decree. Settling Defendant William Montgomery shall construct the 18.51 acres of wetlands in accordance with the Wetland Mitigation and Monitoring Plan at 8 Mile Road Site (“the Mitigation Plan”), which is attached as Attachment B to this Consent Decree, as modified by MDEQ’s conditional approval letter, which is attached as Attachment C to this Consent Decree. Settling Defendant William Montgomery agrees that he will comply with all of the modifications required by the MDEQ in its conditional approval letter, with the exception of Item 7, which would require completion of the work by August 2006. In lieu of that deadline, Settling Defendant William Montgomery agrees to submit a schedule for the completion of wetlands mitigation in accordance with Paragraph 13 of this Consent Decree. Within 30 days of the lodging of this Consent Decree, Settling Defendant William Montgomery shall submit to U.S.

EPA, pursuant to Section XIV (Notices) a draft conservation easement as provided for in the wetlands permit in the form attached as Attachment D to this Consent Decree.

13. Schedule for Completion of Wetlands Mitigation: Within 30 days of the Effective Date of this Consent Decree, Settling Defendant William Montgomery shall submit, for review and approval by the MDEQ and U.S. EPA, a schedule for the completion of the construction of the 18.51 acres of mitigation wetlands, as provided in Settling Defendant's wetlands permit number 97-04-0138-P. The schedule shall provide that the mitigation wetlands shall be completed within one calendar year of the Effective Date of this Consent Decree. The schedule shall also provide completion dates for the following interim construction milestones: (1) Submission of a final monitoring plan, as required by the wetlands permit, (2) The stripping of topsoil and its stockpiling within the berm footprint, (3) The excavation and construction of wetlands basins and berms, (4) The construction of spillways within the berms, (5) The seeding, planting, and mulching of the wetland basin and berms with a nurse crop, (6) The seeding, planting, and mulching of the wetland basin and berms with native plants, and (7) The provision of "as-built" construction plans of wetland basins and berms.

14. U.S. EPA Approval of Wetlands Mitigation Construction Schedule and Conservation Easement

U.S. EPA, after review of the wetlands mitigation construction schedule or conservation easement submitted by Settling Defendant William Montgomery pursuant to Paragraphs 12 and 13 above, shall: (a) approve, in whole or in part, the schedule or conservation easement; (b) approve the schedule or conservation easement upon specified conditions; (c) modify the schedule or conservation easement to cure the deficiencies; (d) disapprove, in whole or in part, the schedule or conservation easement, directing that the Settling Defendant

modify the schedule or conservation easement; or (e) any combination of the above. However, U.S. EPA shall not modify the schedule or conservation easement without first providing Settling Defendant at least one notice of deficiency and an opportunity to cure within 15 days of U.S. EPA's issuance of such notice of deficiency, except where to do so would cause serious disruption to the Settling Defendant's ability to complete the wetlands mitigation within one construction season or where previous schedule(s) or conservation easement(s) have been disapproved due to material defects and the deficiencies in the schedule or conservation easement under consideration indicate the lack of a good faith effort on the part of the Settling Defendant to submit an acceptable schedule or conservation easement.

15. In the event of approval, approval upon conditions, or modification by U.S. EPA, pursuant to Paragraph 14(a), (b), or (c), Settling Defendant William Montgomery shall proceed to implement the schedule, or make the revisions in the conservation easement as approved or modified by U.S. EPA subject only to his right to invoke the Dispute Resolution procedures set forth in Section IX (Dispute Resolution) with respect to the modifications or conditions made by U.S. EPA. In the event that U.S. EPA modifies the schedule or conservation easement to cure the deficiencies pursuant to Paragraph 14(c) and the schedule or conservation easement has a material defect, U.S. EPA retains its right to seek stipulated penalties, as provided in Section VII (Stipulated Penalties).

16. Resubmission of Schedule or Conservation Easement. Upon receipt of a notice of disapproval pursuant to Paragraph 15(d), Settling Defendant William Montgomery shall, within 15 days or such longer time as specified by U.S. EPA in such notice, correct the deficiencies and resubmit the schedule or conservation easement. Any stipulated penalties applicable to the

submission, as provided in Section VII, shall accrue during the 15-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 14 and 15. Upon U.S. EPA's approval of the schedule for the construction of the mitigation wetlands, Settling Defendant William Montgomery shall complete the construction according to the U.S. EPA-approved schedule.

17. CAA Injunctive Relief. Settling Defendants William Montgomery and Montgomery Aggregate Products, Inc. agree to achieve compliance and remain in compliance with the NSPS, the Michigan SIP, and any successor permits issued to Montgomery Aggregate Products, William Montgomery, or any entities controlled by William Montgomery by MDEQ. Settling Defendants William Montgomery and Montgomery Aggregate Products, Inc. further agree to submit all notices required under 40 C.F.R §60.7 to both U.S. EPA and MDEQ, as provided in Section XIV (Notices) in the event that any new affected facilities are installed by the Defendants, specifically, a nonmetallic mineral plant subject to NSPS requirements at 40 C.F.R. §60.670, to comply with other reporting, and recordkeeping requirements at C.F.R §§60.7, and 60.676, and to submit relocation notices as required to both MDEQ and U.S. EPA, for the plant the Settling Defendants now own or operate, and any new plants. Settling Defendants further agree to conduct performance tests, as required by 40 C.F.R. §60.8 (Method 9) should any new plants be installed.

VI. REPORTING REQUIREMENTS

18. Settling Defendants shall submit the following reports:

a. Within thirty (30) days after the end of each six-month period (*i.e.*, by April 30 and October 31) after lodging of this Consent Decree, until termination of this Decree pursuant to Section XVIII (Termination), Settling Defendants shall submit by certified mail a semi-annual

report for the preceding six month period that shall (a) identify any violation of this Consent Decree and provide an explanation of the violation's likely cause and of the remedial steps taken, and/or to be taken, to prevent or minimize such violation; (b) discuss Settling Defendants' progress in satisfying their obligations in connection with the injunctive relief provided for in this Decree (Section V), including a narrative description of activities undertaken since the previous report.

b. If Settling Defendants violate any of the Acts or implementing regulations identified in Paragraph 11 (Compliance Requirements) of this Consent Decree, Settling Defendants shall notify the United States of such violation and its likely duration in writing within ten (10) working days of the day Settling Defendants first become aware of the violation, with an explanation of the violation's likely cause and of the remedial steps taken, and/or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, Settling Defendants shall include a statement to that effect in the report. Settling Defendants shall immediately investigate the cause of the violation and shall submit an amendment to the report, including a full explanation of the cause of the violation, within thirty (30) days of the day Settling Defendants become aware of the cause of the violation. If Settling Defendants seek to invoke force majeure, they shall comply with the requirements of Section VIII of this Decree.

19. Wetlands monitoring: Settling Defendant William E. Montgomery shall monitor the results of the wetlands mitigation required by Paragraph 12 of this Consent Decree and in accordance with the permit issued to Respondent CCMS by the MDEQ for five years after the wetlands mitigation is completed. The wetlands monitoring conducted shall be in accordance with

the wetlands monitoring plan approved by MDEQ and must include the following: (a) wildlife habitat, (b) planned community diversity, (c) stormwater management, quality and hydrology, and (d) sedimentation and erosion control. A report shall be submitted by December 1 of each year for five years beginning in 2008. All aspects of the wetlands monitoring shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by U.S. EPA, after a reasonable opportunity for review and comment by the State. By March 31, 2007, Settling Defendant shall notify U.S. EPA and MDEQ in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. If at any time thereafter, Settling Defendant proposes to change a Supervising Contractor, Settling Defendant shall give such notice to U.S. EPA and MDEQ and must obtain an authorization to proceed from U.S. EPA, after a reasonable opportunity for review and comment by MDEQ, before the new Supervising Contractor performs, directs, or supervises any wetlands monitoring under this Consent Decree.

20. If U.S. EPA determines that, based upon the information set forth in any of the annual reports or other information, that the performance standards set forth in the final monitoring plan approved by MDEQ have not been met, U.S. EPA may require Settling Defendant William E. Montgomery to submit a plan for reasonable and necessary corrective measures, as required by the MDEQ permit.

21. All reports shall be submitted to the persons designated in Section XIV of this Consent Decree (Notices).

22. Each report submitted by Settling Defendant under this Section shall be signed by Settling Defendant and include the following certification:

I certify under penalty of law that I have in good faith examined and am familiar with the information submitted in this document and all attachments and that this document and its attachments, if any, were prepared under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gather and present the information contained therein. I further certify, based on my good faith inquiry of those individuals immediately responsible for obtaining the information, that I believe that the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

23. Settling Defendants shall retain all underlying documents from which it has compiled any report or other submission required by this Consent Decree until five (5) years after termination of the Decree.

24. The reporting requirements of this Consent Decree do not relieve Settling Defendants of any reporting obligations required by the Acts or implementing regulations, or by any other federal, state, or local law, regulation, or requirement.

25. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

VII. STIPULATED PENALTIES

26. If Settling Defendants fail to pay any civil penalty payment (including the interest due) on or before the date it is due pursuant to Paragraph 9 of this Decree (Civil Penalty), Settling Defendants shall pay a stipulated penalty of \$500 per day for each day that the payment is late. Late payment of the civil penalty shall be made in accordance with Paragraph 10 of this Decree. Stipulated penalties shall be paid in accordance with Paragraph 36 of this Decree. All transmittal correspondence shall state that any such payment is for late payment of the civil penalty due under

this Decree, or for stipulated penalties for late payment, as applicable, and shall include the identifying information set forth in Paragraph 10.

27. Settling Defendant William E. Montgomery shall be liable for stipulated penalties in the amounts set forth in Paragraph 28 to the United States for failure to comply with the requirements of this Consent Decree as specified below, unless excused under Section VIII (Force Majeure). “Compliance” shall include completion of the activities under this Consent Decree in accordance with all applicable requirements of this Consent Decree, including the provisions of the wetlands mitigation permit which is attached as Attachment A and fully incorporated into this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

28. Compliance Milestones for William E. Montgomery under the CWA

The following stipulated penalties (in dollars) shall accrue per violation per day for any failure to meet any of the requirements identified below.

		<u>Penalty Per Violation Per Day</u>		
<u>Compliance Milestone</u>	<u>Date</u>	<u>1-30 Days</u>	<u>31-60 Days</u>	<u>Greater than 60 Days</u>
Submit final monitoring plan, as required by wetlands permit	Within 30 days of Effective Date of CD	\$750	\$1500	\$2500
Submit schedule for construction of wetlands mitigation, as provided by Paragraph 13	Within 30 days of Effective Date of CD	\$750	\$1500	\$2500
Strip topsoil and stockpile within berm footprint	As provided by EPA-approved schedule	\$750	\$1500	\$2500

Excavate and construct wetland basins and berms	As provided by EPA-approved schedule	\$750	\$1500	\$2500
Construct spillways within berms	As provided by EPA-approved schedule	\$750	\$1500	\$2500
Seed, plant and mulch wetland basin and berms with a nurse crop	As provided by EPA-approved schedule	\$750	\$1500	\$2500
Seed, plant and mulch wetland basin and berms with native plants	As provided by EPA-approved schedule	\$750	\$1500	\$2500
Provide “as-built” construction plans of wetland basins and berms	As provided by EPA-approved schedule	\$750	\$1500	\$2500
Provide draft Conservation Easement	Within 30 days of CD lodging	\$750	\$1500	\$2500
Provide report of wetlands monitoring	December 1, each year subsequent to completion of wetlands mitigation	\$750	\$1500	\$2500
(Stipulated penalties begin to accrue on December 2 if monitoring not conducted according to Mitigation Plan, as modified by MDEQ’s conditional approval letter)_				
Submission of plan for reasonable and necessary corrective measures	Within 30 days of EPA requirement for plan	\$750	\$1500	\$2500
Implementation of reasonable and necessary corrective measures	As provided by EPA-approved schedule or as directed by EPA	\$750	\$1500	\$2500

29. Settling Defendants William E. Montgomery and Montgomery Aggregate Products, Inc. shall be jointly and severally liable for stipulated penalties in the amounts set forth in Paragraph 30 to the United States for failure to comply with the requirements of this Consent Decree as specified below, unless excused under Section VIII (Force Majeure). “Compliance” shall include completion of the activities under this Consent Decree in accordance with all applicable requirements of this Consent Decree.

30. CAA Compliance Milestones for William E. Montgomery and Montgomery Aggregate Products, Inc.:

The following stipulated penalties (in dollars) shall accrue per violation per day for any failure to meet any of the requirements identified below.

		<u>Penalty Per Violation Per Day</u>		
<u>Compliance Milestone</u>	<u>Date</u>	<u>1-30 Days</u>	<u>31-60 Days</u>	<u>Greater than 60 Days</u>
Obtain a permit to install prior to the installation, construction, or relocation of any facility, or as otherwise required by Michigan Rule 201	Prior to initiation of activity which triggers applicability of Michigan Rule 201	\$750	\$1500	\$2500
Submit notice for the construction or reconstruction of an affected facility as required by 40 C.F.R. §60.7(a) to both MDEQ and U.S. EPA	Within 30 days construction or reconstruction of facility	\$750	\$1500	\$2500
Notification of actual date of initial startup of an affected facility	Within 15 days of startup	\$750	\$1500	\$2500

		<u>Penalty Per Violation Per Day</u>		
<u>Compliance</u>		<u>1-30</u>	<u>31-60</u>	<u>Greater than</u>
<u>Milestone</u>	<u>Date</u>	<u>Days</u>	<u>Days</u>	<u>60 Days</u>
Conduct performance tests for new affected facilities as required by 40 C.F.R. §60.8	Within 60 days after achieving maximum production rate at which the facility will be operated but not later than 180 days after initial start up of the facility	\$750	\$1500	\$2500
Submit relocation notices as required by any permit under the NSPS issued by MDEQ to MAP, Montgomery or to any entity controlled by Montgomery to both MDEQ and U.S. EPA for all plants	At least 10 days prior to scheduled relocation, or as allowed by any special conditions issued to the General Permit by MDEQ	\$750	\$1500	\$2500

31. The United States shall make a demand for stipulated penalties accruing for violations under this Consent Decree, and such stipulated penalties shall be payable in accordance with the following Paragraphs.

32. The United States may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

33. Notwithstanding the date of any demand for such penalties, pursuant to Paragraph 31 above, all stipulated penalties shall begin to accrue on the day after the performance is due or on the day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

34. Penalties shall continue to accrue as provided in accordance with Paragraph 33 during any dispute resolution, with interest on accrued penalties payable and calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of U.S. EPA that is not appealed to the Court, accrued penalties determined to be owing, together with accrued interest, shall be paid to the United States within thirty (30) days of the effective date of the agreement or the receipt of U.S. EPA's decision or order;

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Settling Defendants to whom the penalty is applicable shall, within sixty (60) days of receipt of the Court's decision or order, pay all accrued penalties determined by the Court to be owing, together with accrued interest, except as provided in Subparagraph c, below;

c. If the District Court's decision is appealed by any Party, Settling Defendants to whom the penalty is applicable shall, within fifteen (15) days of receipt of the final appellate court decision, pay all accrued penalties determined to be owing to the United States, together with accrued interest.

35. Upon the Effective Date of this Consent Decree, stipulated penalties for noncompliance occurring between the date of lodging and the Effective Date of this Consent Decree shall be payable pursuant to the terms of this Section. All stipulated penalties must be paid within thirty (30) days of the date payable. Stipulated penalties owing to the United States shall, as directed by the United States, be paid by Electronic Funds Transfer.

36. Should Settling Defendants to whom a penalty is applicable fail to pay stipulated penalties in accordance with the terms of this Consent Decree, the United States shall be entitled to

collect interest on such penalties, as provided for in 28 U.S.C. § 1961, together with the costs (including attorneys fees) incurred in any collection action pertaining to any such stipulated penalties or interest thereon.

37. Subject to the provisions of Section XII of this Consent Decree (Effect of Settlement/Reservation of Rights), the stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States by reason of Settling Defendants' failure to comply with any requirement of this Consent Decree or applicable law.

VIII. FORCE MAJEURE

38. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Settling Defendants, their contractors, or any entity controlled by Settling Defendants that delays the performance of any obligation under this Consent Decree despite Settling Defendants' best efforts to fulfill the obligation. "Best efforts" include using best efforts to anticipate any potential force majeure event and to address the effects of any such event (a) as it is occurring and (b) after it has occurred, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include Settling Defendants' financial inability to perform any injunctive obligation under this Consent Decree, including obligations identified in Sections IV-V of this Decree.

39. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, as to which Settling Defendants intend to assert a claim of force majeure, Settling Defendants shall provide notice in writing, as provided in Section XIV of this Consent Decree (Notices), within seven (7) days of the time Settling Defendants first knew of, or by the exercise of due diligence should have known of, the event. Such notification shall include an

explanation and description of the reasons for the delay; the anticipated duration of the delay; a description of all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; and Settling Defendants' rationale for attributing such delay to a force majeure event. Failure to comply with the above requirements shall preclude Settling Defendants from asserting any claim of force majeure. Settling Defendants shall be deemed to know of any circumstance of which Settling Defendants, their contractors, or any entity controlled by Settling Defendants knew or should have known.

40. Settling Defendants shall have the burden of proving, by a preponderance of the evidence, that each event described in the preceding Paragraph was a force majeure event; that Settling Defendants gave the notice required by the preceding Paragraph; that Settling Defendants took all reasonable steps to prevent or minimize any delay caused by the event; and that any period of delay they claim was attributable to the force majeure event was caused by that event.

41. If the Parties agree that Settling Defendants could not have prevented or mitigated any delay, or anticipated delay, attributable to a force majeure event by the exercise of due diligence, the Parties shall stipulate to an extension of time for Settling Defendants' performance of the affected compliance requirement by a period not exceeding the delay actually caused by such event. Where the extension of time constitutes a material modification to a term of this Consent Decree or is a material modification of any Attachment to this Consent Decree, the appropriate modification shall be made pursuant to Section XVII of this Consent Decree (Modification). In the event the Parties cannot agree, the matter shall be resolved in accordance with Section IX of this Consent Decree (Dispute Resolution). An extension of time for performance of the obligations affected by a force majeure event shall not, of itself, extend the time for performance of any other obligation.

IX. DISPUTE RESOLUTION

42. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, such procedures shall not apply to actions by the United States to enforce obligations of the Settling Defendants that have not been disputed in accordance with this Section.

43. Informal Dispute Resolution. Any dispute that arises under or with respect to this Consent Decree shall first be the subject of informal negotiations. The period of informal negotiations shall not exceed twenty (20) days from the time Settling Defendants send the United States a written “Notice of Dispute” in accordance with Section XIV of this Consent Decree (Notices), unless that period is modified by written agreement. Such Notice of Dispute shall state clearly the matter in dispute. At the end of the Informal Dispute Resolution period, U.S. EPA shall respond, in writing, to the Notice of Dispute (“U.S. EPA Response”). For purposes of this Consent Decree, this U.S. EPA Response shall be considered a final agency decision. Consistent with Paragraph 32, the United States may exercise its discretion in reducing or waiving any stipulated penalties which have accrued during the informal dispute resolution period.

44. Administrative Record. An administrative record of the dispute shall be maintained by U.S. EPA and shall contain the Notice of Dispute, the U.S. EPA Response, together with any supporting documentation or other appropriate records maintained by U.S. EPA or submitted by Settling Defendants. These documents shall constitute the administrative record upon which the matter in dispute is to be resolved, when such resolution proceeds on the administrative record under this Section.

45. Formal Dispute Resolution.

a. If the Parties cannot resolve a dispute by informal negotiations pursuant to Paragraph 43, then the position advanced by the United States shall be considered binding, unless, within twenty-eight (28) days after the conclusion of the informal negotiation period, Settling Defendants invoke formal dispute resolution procedures by filing a motion with this Court and serving such motion upon the United States, in accordance with Section XIV of this Consent Decree (Notices). In addition to containing the supporting factual data, analysis, opinion, and documentation upon which Settling Defendants rely, the motion shall describe the history of the matter in dispute, the relief requested, and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

b. In any judicial proceeding pursuant to this Paragraph that concerns the performance of the Compliance Requirements under Section V of this Consent Decree or that is otherwise accorded review on the administrative record under applicable principles of administrative law, the administrative record compiled by U.S. EPA under Paragraph 44 shall be accorded the deference normally conferred upon the administrative records of executive branch agencies under applicable principles of administrative law. In all other disputes, judicial review of such decision shall be based on applicable principles of law.

46. The invocation of dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of Settling Defendants under this Consent Decree, not directly in dispute, unless the United States or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 34, above. In the

event that Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VII (Stipulated Penalties).

X. INFORMATION COLLECTION AND RETENTION

47. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry to any facility covered by this Consent Decree at all reasonable times, without prior notice, upon presentation of credentials to assess Settling Defendants' compliance with this Consent Decree. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal or state laws, regulations, or permits.

48. Until five (5) years after the termination of this Consent Decree, Settling Defendants shall retain, and shall instruct their contractors and agents to preserve, all non-identical copies of all records and documents (including records or documents in electronic form) now in their or their contractors' or agents' possession or control, or that come into their or their contractors' or agents' possession or control, and that relate in any manner to Settling Defendants' performance of their obligations under this Consent Decree. This record retention requirement shall apply regardless of any corporate document-retention policies to the contrary.

XI. FAILURE OF COMPLIANCE

49. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Settling Defendants' compliance with any aspect of this Consent Decree will result in compliance with provisions of the Acts. Notwithstanding the United States' review and approval of any documents submitted to it by Settling Defendants pursuant to this Consent Decree, Settling Defendants shall remain solely responsible for compliance with the terms of the Acts and this Consent Decree.

XII. EFFECT OF SETTLEMENT / RESERVATION OF RIGHTS

50. As to the Settling Defendants, this Consent Decree fully and finally resolves the civil claims of the United States for the environmental violations alleged in the Complaint filed in this action.

51. This Consent Decree shall not be construed to prevent or limit the rights of the United States to obtain penalties or injunctive relief under the Acts, or under other federal or state laws, regulations, or permit conditions, except as expressly specified herein.

52. Settling Defendants are responsible for achieving and maintaining complete compliance with all applicable federal, State and local laws, regulations, and permits; and Settling Defendants' compliance with this Consent Decree shall be no defense to any action commenced pursuant to said laws, regulations, or permits. This Consent Decree does not limit or affect the rights of Settling Defendants or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Settling Defendants, except as otherwise provided by law.

53. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

54. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated herein.

XIII. COSTS

55. The Parties shall each bear their own costs of litigation of this action, including attorneys fees, except as provided in Paragraph 36, above.

XIV. NOTICES

56. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

To the United States:

Jennifer L. McManus
Assistant U.S. Attorney
Western District of Michigan
P.O. Box 208
Grand Rapids, MI 49501-0208

To U.S. EPA:

Notices Provided by William E. Montgomery under the CWA

Greg Carlson (WW-16J)
United States Environmental Protection Agency
77 West Jackson Blvd.
Chicago, IL 60604-3590

and

James Cha
Associate Regional Counsel
Region 5
77 West Jackson Blvd., Mail Code C-14J
Chicago, IL 60604-3590

Michigan Department of Environmental Quality
Office of Civil Enforcement Coordination, Attn: Timothy McGarry
Constitution Hall
525 West Allegan Street
P.O. Box 30473
Lansing, MI 48909-7973

and

Mark Feldhauser
Michigan Department of Environmental Quality - LWMD
420 Fifth Street
Gwinn, MI 49841

Notices Provided by William E. Montgomery and Montgomery Aggregate Products, Inc.

Jeffrey Gahris
Environmental Engineer
United States Environmental Protection Agency
Region 5
77 West Jackson Blvd., Mail Code AE-17J
Chicago, IL 60604-3590

and

Sherry L. Estes
Associate Regional Counsel
Region 5
77 West Jackson Blvd., Mail Code C-14J
Chicago, IL 60604-3590

Michigan Department of Environmental Quality
Office of Civil Enforcement Coordination, Attn: Timothy McGarry
Constitution Hall
525 West Allegan Street
P.O. Box 30473
Lansing, MI 48909-7973

and

Michigan Department of Environmental Quality
Air Quality Division, Attn: Thomas Hess, Chief, Enforcement Unit
Constitution Hall
525 West Allegan Street
P.O. Box 30473
Lansing, MI 48909-7973

To Settling Defendants:

William E. Montgomery
7151 S. M-129
Sault Ste. Marie MI 49783

Any party may, by written notice to the other parties, change its designated notice recipient or notice address provided above.

57. Notices submitted pursuant to this Section shall be deemed effective upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

XV. EFFECTIVE DATE

58. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

XVI. RETENTION OF JURISDICTION

59. The Court shall retain jurisdiction of this case until termination of this Consent Decree, for the purpose of enabling any of the Parties to apply to the Court for such further order, direction, or relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section IX of this Decree (Dispute Resolution).

XVII. MODIFICATION

60. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to any term of this Decree, it shall be effective only upon approval by the Court. Any schedules approved by U.S. EPA pursuant to the terms of this Consent Decree may be modified upon written agreement of the Parties without Court approval, unless any such modification effects a material change to the terms of this Consent Decree or materially affects the Settling Defendants' ability to meet the objectives of this Decree.

XVIII. TERMINATION

61. After Settling Defendants have demonstrated compliance with the Environmental Compliance requirements set forth in Paragraph 11, restored the mitigation wetlands as required by Paragraph 12, complied with the annual wetlands monitoring and reporting requirements set forth in Paragraph 19, and complied with the CAA injunctive relief requirements set forth in Paragraph 17, and have paid all statutory and stipulated penalties owing under this Consent Decree, Settling Defendants may serve upon the United States a “Motion for Termination of Consent Decree” (“Motion”), with supporting documentation demonstrating that Settling Defendants have successfully completed all requirements of this Decree, including (i) maintaining substantial compliance with the requirements of the Acts, any permits under the Acts, and this Consent Decree following the Effective Date; (ii) completing the construction of the wetlands mitigation and any reasonable and necessary corrective measures required by U.S. EPA, and (iii) paying the civil penalties required by Paragraph 9, and any accrued stipulated penalties as required by this Consent Decree.

62. Following receipt by the United States of Settling Defendants’ Motion, the Parties shall schedule one or more conferences (which may be by telephone) to discuss the Motion and any disagreement that the Parties may have as to whether Settling Defendants have satisfactorily complied with the requirements of the Consent Decree and whether all other requisite conditions for termination of the Decree have been satisfied. Such period of consultation shall continue for no less than twenty (20) days following receipt of Settling Defendants’ Motion.

63. If, following the consultation period provided for by the preceding Paragraph, the Parties cannot come to agreement as to whether Settling Defendants have satisfactorily complied with the requirements of the Consent Decree, or whether all other requisite conditions for

termination of the Decree have been satisfied, Settling Defendants may file their Motion with the Court.

64. The United States shall have the right to oppose Settling Defendants' Motion and to seek an extension of the Decree.

65. If, following the consultation period provided for by Paragraph 63, above, the Parties agree that Settling Defendants have satisfactorily complied with the requirements of the Decree and that all other requisite conditions for termination of the Decree have been satisfied, they shall file with the Court an appropriate pleading so notifying the Court and requesting termination of the Decree.

XIX. PUBLIC PARTICIPATION

66. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to entry of this Consent Decree without further notice.

XX. SIGNATORIES / SERVICE

67. Each undersigned representative of each Settling Defendants and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

68. This Consent Decree may be signed in counterparts, and such counterpart signature pages shall be given full force and effect.

69. Settling Defendants hereby agree not to oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Decree.

70. Settling Defendants hereby agree to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XXI. INTEGRATION / ATTACHMENTS

71. This Consent Decree and its Attachments constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersede all prior agreements and understandings, whether oral or written. Other than the Attachments, which are attached to and incorporated in this Decree, no other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

72. The following documents are attached to and incorporated into this Consent Decree:

Attachment A is the wetlands mitigation permit approved by MDEQ.

Attachment B is Marquette Avenue Wetland Mitigation and Monitoring Plan at 8 Mile Road Site, dated May 15, 2006.

Attachment C is the April 28, 2006 contingent approval letter, which was modified by the June 26, 2006 Conditional Approval Letter issued by MDEQ.

Attachment D is a form Agreement for Conservation Easement.

XXII. FINAL JUDGMENT

73. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the United States and Settling Defendants.

Dated and entered this ____ day of _____, 2007.

[proposed Consent Decree lodged for public comment - do not sign]

SENIOR U.S. DISTRICT JUDGE RICHARD ALAN ENSLEN
Western District of Michigan

FOR PLAINTIFF UNITED STATES OF AMERICA:

MARGARET M. CHIARA
United States Attorney

Date: March 8, 2007

By: Jennifer L. McManus
Assistant U.S. Attorney
Western District of Michigan
P.O. Box 208
Grand Rapids, MI 49501-0208

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

Date: March 6, 2007

MARY A. GADE
Regional Administrator
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Date: February 28, 2007

BERTRAM C. FREY
Acting Regional Counsel
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604

FOR DEFENDANT MONTGOMERY AGGREGATE PRODUCTS, INC.

Date: March 8, 2007

WILLIAM E. MONTGOMERY
President
Montgomery Aggregate Products, Inc.
7151 S. M-129
Sault Ste. Marie MI 49783

FOR DEFENDANT WILLIAM E. MONTGOMERY, AN INDIVIDUAL

Date: March 8, 2007

WILLIAM E. MONTGOMERY
7151 S. M-129
Sault Ste. Marie MI 49783